Filed 2/8/10 In re A.E. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.E., a Person Coming Under the Juvenile Court Law.	B217279 (Los Angeles County Super. Ct. No. CK71882)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. AMBER E. et al., Defendants and Appellants.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan G. Levine, Judge. Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant Amber E.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant A.H.

Office of County Counsel, James M. Owens, Assistant County Counsel, Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Amber E. (Mother) and A.H. (Father) appeal from a dependency court order terminating their parental rights to their two-year-old daughter A., who was born with drugs in her bloodstream. Neither Mother nor Father made any substantial progress in completing the court-ordered case plan, which required random drug testing, domestic violence counseling, and parenting classes. None of these requirements was accomplished over a 16-month period. Substantial evidence supports the dependency court's termination of parental rights. Further, Father was not deprived of reasonable reunification services.

FACTS

A. was born in January 2008. Mother tested positive for marijuana and amphetamines in drug screenings at the hospital during delivery, and A. tested positive for amphetamines. The Department of Children and Family Services (DCFS) was notified of the results of the drug screenings; however, it did not detain A. Instead, DCFS left A. in Mother's care under a "voluntary family maintenance" plan.

Mother promptly violated the terms of voluntary plan by failing to take five random drug tests, even though the DCFS social worker "went over the case plan with emphasis on drug testing." Father failed to appear for four random drug tests. As a result of these voluntary plan violations, A. was taken into protective custody on March 5, 2008, when she was seven weeks old.

At the time of A.'s detention, Mother disclosed that she was living with Father. The DCFS voluntary plan contemplated that Mother would reside with her maternal aunt, who promised to help Mother "get organized so she could complete all of her [case plan] requirements." Mother received no prenatal care. She claimed that she did not use drugs during her pregnancy, until the day that A. was born. By the same token, Mother admitted that she has been using drugs since A.'s birth. For his part, Father told the social worker that he failed to drug test because "I didn't take it as seriously as I should have." Father failed to attend programs required by the voluntary plan because he was too busy.

This is not Father's first experience with DCFS. In 2001, a petition was sustained with respect to Father's child from another relationship, on the grounds that Father "engaged in altercations in the child's presence." Apart from a dependency record with DCFS, Father has a criminal record: vandalism (2006); carrying a concealed weapon in a car (2004); battery on a spouse (2004); inflicting injury on a spouse/cohabitant (1994); and carrying a loaded firearm in a public place (1992).

A dependency petition was filed on March 10, 2008. As amended on April 22, 2008, it alleges that: Mother placed A. at risk of harm by exposing her to drugs during pregnancy, and A. was born with a positive toxicology screen for amphetamines; Mother and Father are current abusers of amphetamines and marijuana, which renders them incapable of providing A. with regular care and supervision; and Father has a criminal history of inflicting corporal injury on a spouse and engaged in violent altercations in the presence of A.'s half-sister, which resulted in the child becoming a dependent of the court.

At the detention hearing on March 10, 2008, the court found a prima facie case for detaining A. Mother and Father denied the allegations in the petition. Father was found to be a presumed father. A. was placed in foster care. Mother and Father were given four hours per week of monitored visitation, and were ordered to begin counseling and submit to weekly random drug tests.

DCFS submitted a report in April 2008, in advance of the jurisdiction/disposition hearing. In an interview, Mother reiterated to the caseworker that she used drugs only once during her pregnancy, on the day A. was delivered; however, Mother previously told a hospital social worker that she used marijuana during her pregnancy to "rest." Mother did not understand "the effects of drug use on infants," and seemed "disengaged and detached." Mother described herself as an occasional user of methamphetamines and marijuana for the last two years, and a drug test on March 18, 2008, returned positive for amphetamines and methamphetamines. Mother had no response when the caseworker asked her about this positive test. Mother failed to appear for testing on January 18, February 14, February 29, March 3, and March 5, 2008.

Father stated that he has never seen Mother use drugs. He and Mother were enrolled in substance abuse, parenting and domestic violence programs. Father asserted that the prior charges against him of domestic violence and spousal abuse are untrue, and A. is not at risk of harm with him and Mother. Father denied ever using methamphetamines or amphetamines, and has not smoked marijuana for a year or two. Father was arrested in December 2007 for marijuana possession, though he denies that he was carrying any drugs.

The instructor of the family reunification programs indicated that Mother's and Father's attendance was inconsistent. Of a possible 30 days of classes, they attended only six full days and were frequently 10 minutes late to class. The instructor could not recommend them for custody of A., or even unmonitored visitation with A. due to the parental lapses in program attendance. Mother and Father were visiting A. regularly for five hours per week. The foster mother informed DCFS that she was willing to adopt A. if the family failed to reunite.

Mother and Father waived their right to a contested hearing on the amended petition, and submitted on the basis of the DCFS reports. On April 22, 2008, the court conducted a jurisdictional hearing. It sustained allegations that: Mother has a history of substance abuse and A. was born with a positive toxicological screen for amphetamines, placing A. at risk of physical and emotional harm; and Father has a history of engaging in violent altercations, endangering A.'s health and safety. A. was declared a dependent of the court.

Mother and Father agreed in writing to the court-ordered disposition plan. Father was ordered to participate in individual counseling to address domestic violence and parenting. He also had to take four random drug tests: if any test was missed or "dirty," Father had to complete a drug rehabilitation program. Mother was ordered to participate in individual counseling to address parenting and drug abuse, and to submit to random drug testing. Both parents were authorized to have monitored visitation. The court warned Mother and Father that they were entitled to six months of services, because A. was only three months old, adding that "unless you've made significant progress" by

visiting A. and accomplishing the case plan, their services would be terminated and A. could be adopted. The DCFS social worker met with Mother and Father on April 23, 2008, to review the court orders with them and answer their questions to ensure they understood what requirements had to be fulfilled.

In October 2008, DCFS reported that A. was "very comfortable and happy" with her foster mother, who was meeting A.'s emotional, educational and medical needs. A. was bonded to the foster mother and familiar with the other children in the home. The foster mother was "instrumental in the progress that [A.] has accomplished in her development," and was interested in adopting A.

During the reporting period (April-October 2008), Mother failed to complete any of the court-ordered classes. Despite enrolling in parenting and substance abuse classes in January 2008, Mother's attendance was insufficient. Mother failed to appear for drug testing on May 8, June 3, July 24, August 29, September 4 and September 10, 2008. When she appeared for testing on five occasions, the results were negative for drugs. Mother missed visits with A. on August 11, 15, 18, 20, 22, and 27, and on September 3, 10, 19, 22, 24 and 29, 2008. Eleven visits during June and July "were okay." She was affectionate with A. during visits in August and September, and they appeared to be bonded.

Father was arrested on domestic violence charges and a parole violation on May 30, 2008. He was slated for release from prison in January 2009, and was unable to visit A. due to his incarceration. Father failed to appear for drug testing on May 13, May 20, and June 5. He tested negative for drugs on March 19, April 10 and April 30.

In November 2008, the DCFS social worker discovered that Mother was arrested four times in 2008: for being under the influence (to which she pleaded guilty); for passing fictitious checks (to which she pleaded guilty); for possession of a controlled substance (case pending); and on an outstanding warrant. On November, 5, 2008, Mother announced to the social worker that she was going to begin a drug rehabilitation program. Five days later, Mother announced that she was leaving the rehabilitation program. Mother enrolled in a substance abuse/parenting program on November 18,

2008. As of December 1, 2008, Mother had participated in two hours of parenting class. The social worker learned that Father's prison, in Lancaster, "is a revolving door" that does not offer classes to satisfy family reunification requirements.

A contested hearing was conducted on December 1, 2008. At issue was whether Father was receiving adequate family reunification services during his incarceration. Father requested six additional months of services to complete his case plan after his release. Mother requested six additional months of services because she was bonding with A. and was trying to complete her case plan by re-enrolling in drug and parenting programs.

The court terminated reunification services for Mother due to her lack of compliance with the case plan. As to Father, the court initially opined that "I don't think he got reasonable services, but I'm not prepared to delay permanency for this child . . ." and suggested that the DCFS social worker could "do a better job of being in contact with father, with his place of incarceration." The court went on to state, "The court finds that the department has complied with the case plan in making reasonable efforts." The minute order reflects the court's finding that reasonable efforts were made by DCFS. The court concluded that Father would not be able to complete his case plan and have A. returned to him within six months. Accordingly, the court terminated Father's reunification services. The court found no reasonable probability that A. could be returned to her parents within 12 months of her March 2008 detention. Mother and Father had not made significant progress or demonstrated their ability to complete the objectives of the case plan. The court urged Mother and Father to complete the case plan before the permanent plan hearing. The court identified adoption as the likely permanent plan.

Father gave notice of his intent to file a writ petition challenging the dependency court's termination of reunification services.[1] On January 7, 2009, Father's counsel filed

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[1] We take judicial notice of the file in Father's writ proceeding.

a "no merit" letter with this Court indicating that she was unable to file a writ petition on Father's behalf, pursuant to *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570. Father was notified of counsel's decision not to file a petition, and was given 15 days to file a petition on his own. He did not do so, and the case lapsed.

DCFS submitted a report for the permanent plan hearing. The report states that the foster mother has applied for adoption. She has cared for A. since the child was two months old, and is determined to provide a stable, loving, permanent home for A. She has made an effort to maintain a relationship with Mother, and is willing to retain contact after adoption. DCFS wrote, "It is evident that there is a close and nurturing relationship between foster mother and [A.]." An adoption home study for the caregiver was approved on March 5, 2009.

Mother and Father continued to have monitored visits lasting one to two hours. Following his release from prison, Father visited A. on January 28, February 2, February 11, February 17, February 18, and February 27, 2009. He missed the first two weeks of March, but visited on March 16. The visits went well: Father holds A., changes her diaper, helps her walk, acts affectionately, and makes the most of his visits. Father and A. "enjoyed their time together."

Mother's visits were inconsistent. According to the foster family agency, Mother saw A. on November 21, 2008, followed by January 5, February 17, and February 27, 2009. Mother changed A.'s diapers and tried to engage her in play. Mother was sometimes moody during visits. DCFS recommended termination of parental rights so that it could proceed with adoption.

DCFS gave the court a supplemental report on April 24, 2009. It indicated that Mother had a visit with A. on March 31, 2009, for a total of four visits during 2009. Father generally visited twice weekly, though there were times when he came once a week. "During visits father appears to be very concerned for [A.]'s well-being and is trying to build a relationship." Both Mother and Father behaved appropriately with A., and she appears to enjoy the time spent with her parents. Mother showed up unannounced at the foster agency for a visit. The caregiver was not present, but was

willing to bring A. to the foster family agency despite not having any advance notice. Mother made a face, rolled her eyes, and walked out upon learning that the foster caregiver was on her way to the agency. Father remained at the agency and had a visit with A.

DCFS prepared a second supplemental report on May 14, 2009. The report revealed that Mother visited with A. on April 30, May 8, and May 11, 2009, for one hour each time. Mother was happy to see A. and brought toys and clothing for A. Father continued to visit twice weekly. Father did not provide DCFS with any information regarding his enrollment in classes or his desire to reunify with A. DCFS did not liberalize Father's visits as he had not complied with the case plan. In a status report, DCFS wrote that the foster mother continued to provide a safe and nurturing home environment for A. and was patiently waiting to adopt A. There was a strong bond between A. and the foster mother, who has "caring and loving interactions with [A.] on a daily basis."

A contested permanent plan hearing was held on May 21, 2009. Mother and Father offered no testimonial or documentary evidence at the hearing. Father's attorney argued that Father was currently enrolled in a parenting class and a drug outpatient program. He visits A. regularly since his release from prison in January 2009, and she refers to him as "Dada." Mother argued that she visits regularly, interacts appropriately with A., and is bonded with A.

The court acknowledged the efforts made by Father since January; however, it could not find that A. would benefit from a continued relationship with either Mother or Father. They lack a parental relationship with A., and it would be detrimental for A. to be returned to their custody. The court found that DCFS had made reasonable efforts to ensure compliance with the case plan. The court terminated parental rights and ordered adoption as the permanent plan.

DISCUSSION

Mother and Father appeal from the order terminating their parental rights. On appeal, we determine if there is any substantial evidence to support the conclusions of the

juvenile court. All conflicts are resolved in favor of the prevailing party and all legitimate inferences are drawn to uphold the lower court's ruling. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 774.)

At the selection and implementation hearing, the court must select adoption as the permanent plan and terminate parental rights if it finds that the child is likely to be adopted. (Welf. & Inst. Code, § 366.26, subd. (c)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 49; *In re Jamie R.*, *supra*, 90 Cal.App.4th at p. 773.) [2] Adoption is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826; *In re Ronell A.* (1995) 44 Cal.App.4th 1352, 1368.) A parent may avoid termination of parental rights by showing that it would be detrimental to the child. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53.)

Mother's Appeal

Mother argues that termination of parental rights would be detrimental to A. because Mother has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) Mother carries the burden of showing that the statutory exception applies, and that termination would be detrimental to the child. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 826; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.)

1. Regular Visitation and Contact

Mother's visitation with A. has been inconsistent. Although there were periods when Mother visited regularly, her interest apparently waned. For instance, Mother saw A. on November 21, 2008, but did not visit again until January 5, 2009, a gap of six weeks. Mother's next two visits were in mid- and late-February, followed by March 31 and April 30, 2009.

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[2] Mother and Father do not dispute that A. is likely to be adopted.

Mother's erratic schedule does not amount to "regular" visitation, particularly since Mother was entitled to visit for a minimum of four hours per week. In *In re Zeth S.* (2003) 31 Cal.4th 396, 401-402, for example, a mother visited her son no more than once per week for four months and not at all for two months, leading to a finding that her visits were not regular. When visitation is initially consistent, but becomes "sporadic" during the months before the selection and implementation hearing, this is not sufficient to meet the requirement of regular visitation. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) A parental bond cannot be established when a parent sees the child once per month, as occurred in the case at bench.

2. Benefit to the Child

Even if Mother's visitation and contacts were sufficiently regular, she still had to establish that A. would benefit from continuing the relationship. The trial court determined that A.'s relationship with Mother is not so substantial that the child would be greatly harmed if it were severed. Mother carries the burden of proving that A. would be "greatly" harmed by termination of parental rights, and that she holds a "parental" role with the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853-854; *In re Angel B.* (2002) 97 Cal.App.4th 454, 466-468.)

A showing that a child would be greatly harmed is difficult to make when, as here, "the parents have . . . [not] advanced beyond supervised visitation." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Mother's history of drug abuse prevents her from having unmonitored, weekend or extended visits, let alone custody of A. A true parental relationship would not require a third party to monitor parent-child visits.

Even frequent and loving contact between parent and child is not sufficient to establish the requisite benefit to the child if Mother does not occupy a parental role and is unable to take custody. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.) For over a year after A. was removed from her custody, Mother did not demonstrate any significant interest in rehabilitating herself to assume a custodial or parental role. Mother attended few counseling sessions, had a positive test

for methamphetamines in March of 2008, and missed many other random drug tests, all of which count as "dirty" tests. She has not shown a serious commitment to a drug rehabilitation program, despite giving birth to a child while using amphetamines. In addition, Mother was arrested four times during 2008, and pleaded guilty to a drug charge, all during the dependency proceeding.

A. has bonded closely with her foster mother, who is credited with helping A. to achieve all of her developmental accomplishments. By contrast, Mother has not progressed to the point where she would be allowed to have unmonitored or overnight visits with A., even if the visits are enjoyable for Mother and for A. A relationship that is "pleasant" is not enough to establish a benefit to the child because "it bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship." (*In re Derek W., supra*, 73 Cal.App.4th at p. 827.) At most, Mother is someone A. enjoys seeing, but she is not the nurturing parental figure that her foster mother has become after two years in foster care.

"Interaction between natural parent and child will always confer some incidental benefit to the child." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Apart from that interaction, we must consider "the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id.* at p. 576.) In this instance, A. was removed from Mother's custody when she was only seven weeks old, and thus has no memory of Mother as a caregiver. During A.'s brief lifetime, Mother has never been more than an occasional visitor. All of A.'s daily needs have been met by her foster mother.

The trial court's order terminating parental rights is supported by substantial evidence and must be upheld. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) Balancing Mother's friendly--but not parental--relationship with A. against the security of a permanent home, it is clear that the legislative preference for adoption applies here. Adoption will provide A. with permanency, stability and security, and continued foster

care or a legal guardianship is not equivalent to the stability of a permanent home. (See *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1156; *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 249-251.)

Father's Appeal

Father argues that the dependency court erred by terminating his parental rights after DCFS failed to provide him with adequate reunification services during his incarceration in Lancaster. Father also maintains that he received ineffective assistance of counsel, who declined to file a writ petition in support of Father's claim that he did not receive reunification services from DCFS.

The law provides that "The court shall not terminate parental rights if . . . [a]t each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided." (Welf. & Inst. Code, § 366.26, subd. (c)(2)(A); Cal. Rules of Court, rule 5.725.) In this case, the court's minute orders state that reasonable efforts were made and Father received family reunification services from DCFS. The court also made verbal findings on the record that DCFS provided Father with reasonable services.

The court intimated during the hearing on December 1, 2008, that the social worker should have made more effort to stay in contact with Father during his incarceration. Nevertheless, the social worker's failure to discover the lack of programs at Father's prison changed nothing, as neither the social worker nor the dependency court had any power to order Father transferred to a prison that offers programs. "We recognize that the mere fact that *more* services could have been provided does not render the Department's efforts unreasonable." (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 973, italics added.) Demanding that DCFS drive an infant to a prison in Lancaster for visits is beyond what is required of the social worker, not to mention the detriment that it would cause to A.

We disagree that Father was deprived of an opportunity to satisfy the case plan requirements with the help of DCFS. Even before the dependency court became involved, Father failed to meet the voluntary plan by appearing for drug testing under the

supervision of DCFS. His excuse was that "I didn't take it as seriously as I should have." Once the dependency court became involved, Father was directed to drug test and participate in counseling at the detention hearing on March 10, 2008. Father could have satisfied the case plan requirement of four consecutive negative drug tests before his arrest on May 30, 2008. Instead, he failed to appear for testing on May 13 and May 20, which counted as "dirty" tests. As a result, Father was required to complete a drug rehabilitation program. Father also failed to meet the case plan requirement of domestic violence counseling and parenting classes. Though he was directed to start these classes in January 2008, after A.'s birth, he attended only six out of 30 possible days of class.

The case at bench is not comparable to *In re Alvin R.*, where "Father had done all that was required of him under the plan" but was deprived of visitation by the child's caregiver. (108 Cal.App.4th at p. 973.) Here, Father visited A., but otherwise did not complete the case plan. The case at bench is also not comparable to *In re T.M.* (2009) 175 Cal.App.4th 1166, 1171, in which "reasonable services were not offered because *no services were offered* . . . ." Indeed, "no case plan was developed" in *In re T.M.* (*Id.* at p. 1169.) As a result, the dependency court neither denied services nor terminated them, which was in error. (*Id.* at p. 1173.) Here, DCFS began offering services in January 2008, after A. was born, and a case plan was established in March 2008. Neither Mother nor Father availed themselves of these services.

Regardless of whether family reunification services were available to Father during his incarceration, Father did not demonstrate a serious commitment to rehabilitating himself Father did not drug test regularly during the 16-month period when DCFS was involved. Father presented no testimonial or documentary evidence that he enrolled in drug rehabilitation, domestic violence, and parenting programs following his release from prison, to demonstrate a good faith effort to complete the case plan. Thus, the dependency court did not abuse its discretion by terminating Father's reunification services in December 2008, and counsel did not render ineffective assistance to Father by declining to file a writ petition.

DISPOSITION

The judgment (order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.